Supreme Court, U. S.
FILED
NOV 4 1977
MICHAEL RODAK, JR., CLERK

No. 77-316

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES KARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial judge abused his discretion by denying a motion for a mistrial based on the allegation of defense counsel that petitioner appeared intoxicated or under the influence of drugs on the morning of trial.

1. Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of one count of uttering a counterfeit $20 bill, in violation of 18 U.S.C. 472. A co-defendant was acquitted (Tr. 317). Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

When petitioner's case was called for trial, defense counsel moved for a continuance, stating that petitioner

"appear[ed] to be totally inebriated" or "under the influence of drugs" and kept falling asleep (Tr. 5). The court called petitioner and his co-defendant into chambers, where the following conversation between petitioner and the court took place (Tr. 10-12):

BY THE COURT: (To. Mr. Karnes) How do you feel this morning?

MR. KARNES: All right.

BY THE COURT: Pardon me?

MR. KARNES: Fine.

BY THE COURT: Feel good?

MR. KARNES: Sure. Ready to go to court.

BY THE COURT: Pardon me?

MR. KARNES: Ready to go to court.

BY THE COURT: Ready to go to court?

MR. KARNES: (Nods head affirmatively.)

BY THE COURT: Well, your lawyer said—made some mention to the fact that you might not be ready, that you might have had a drink or two.

MR. KARNES: Well, I did have a few drinks last night.

BY THE COURT: Last night?

MR. KARNES: Yes, sir.

BY THE COURT: Nothing this morning?

MR. KARNES: No.

BY THE COURT: So you're just recovering from maybe too many drinks last evening?

MR. KARNES: Yes, sir.

BY THE COURT: Do you feel okay this morning, ready to go to trial?

MR. KARNES: Well, I don't know if I can answer the questions right.

BY THE COURT: Well, you haven't had any problem telling your lawyer about your side of this controversy, have you?

MR. KARNES: Not up to this point. But maybe I will have now. I'm sort of jittery and shaky.

BY THE COURT: Well, if you can—I mean, you don't have any problem making him understand you and you think you can assist him in the trial of your case, do you?

MR. KARNES: Please?

BY THE COURT: You don't have any problem communicating with your attorney and discussing your case with your attorney and assisting him and helping him in your defense, do you?

MR. KARNES: Why, I don't know. I don't know if I would say the right thing or the wrong thing.

BY THE COURT: Well, I don't know about that, either. But I'm just talking about, you can say what you intend to say, can't you?

MR. KARNES: I—well, yeah. But I don't know if that would be right or wrong.

BY THE COURT: Well, you can tell the truth, can't you,—

MR. KARNES: (Interrupting) Yeah.

BY THE COURT: (Continuing)—if you are to be testifying? I don't know; he may not call you. That's a decision for you all to make.

All right. You can go. Overrule the motion.

At 10:40 a.m., after a jury had been selected, the court ordered a recess until 1:30 p.m. to permit the defendants to rest and make themselves more presentable (Tr. 43, 46). Following the recess, petitioner's counsel said that his client's condition had "improved" but stated that petitioner was still not capable of testifying and that petitioner had fallen asleep several times during jury selection that morning (Tr. 47-49). Counsel then moved for a mistrial (Tr. 49-50). After noting that neither defendant would testify that day (Tr. 47-48), the court denied the motion (Tr. 53), stating that there was no reason to believe that either defendant was incapable of assisting his attorney in the conduct of the defense (Tr. 52).

2. The issue presented by this petition is the paradigm of the kind of issue that must necessarily be committed principally to the discretion of the trial court. Here, there is no basis for concluding that the trial court abused its broad discretion in refusing to grant petitioner's motions for a continuance and a mistrial. Petitioner never claimed that he was, in fact, intoxicated or under the influence of drugs, and nothing in the record or in the petition indicates that petitioner fell asleep or was otherwise incapacitated during the testimony that afternoon.[1]

[1]The testimony consisted of the following: The owner of a local tavern testified that petitioner uttered two counterfeit $20 bills (Tr. 82, 83). She said that petitioner later returned to the tavern after his arrest and offered to make restitution for one of the counterfeit notes (Tr. 85-86). A Secret Service Agent testified that petitioner made three different statements concerning the incident (Tr. 129, 131) and that, in the third statement, petitioner first admitted and then denied knowing that the bills were counterfeit, claiming that others had given him the money, told him to try to pass it, and promised to take care of him if he got into trouble (Tr. 131). When petitioner testified on the second day of trial, he denied having ever told the agent that he knew the bills were counterfeit or that others had asked him to pass the bills (Tr. 197, 207).

Moreover, the transcript demonstrates that petitioner responded coherently to the trial judge's questions in chambers and stated only that he had a hangover (see pp. 2-3, *supra*). On the basis of this record, the trial judge concluded that petitioner could assist in his own defense, and the court of appeals correctly refused to substitute its judgment for his on-the-spot observations and impressions. See *Bernstein* v. *Travia*, 495 F. 2d 1180 (C.A. 2); *United States* v. *Goodwin*, 455 F. 2d 710 (C.A. 10), certiorari denied, 409 U.S. 859; *Stein* v. *United States*, 263 F. 2d 579 (C.A. 9); *United States* v. *Tom*, 340 F. 2d 127 (C.A. 2), certiorari denied, 382 U.S. 912; cf. *Illinois* v. *Allen*, 397 U.S. 337.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

DOJ-1977-11